Filed 6/17/16 Conservatorship of Duque CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Conservatorship of the Estate of WILLIAM J. DUQUE. _____ JEFFREY SIEGEL, as Conservator, Petitioner and Respondent, v. JULIUS JOHNSON, Objector and Appellant.	B260132 (Los Angeles County Super. Ct. No. GP009693)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Julius Johnson, in pro. per., for Objector and Appellant.

Oldman, Cooley, Sallus, Birnberg & Coleman, Nathan Talei and Sarah Talei for Petitioner and Respondent.

Attorney Julius Johnson (Johnson) appeals an order of the probate court denying his request to be paid attorney fees out of the conservatorship estate of his client, William Duque (Duque).[1] We conclude that the probate court did not abuse its discretion in denying the attorney fee request, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background

Duque suffered a brain injury as a result of a serious car accident in October 1999. A personal injury lawsuit was filed on Duque's behalf, and pursuant to a settlement agreement, Duque received funds that comprise the conservatorship estate. A conservatorship proceeding was commenced, and Duque's uncle was named conservator of Duque's estate. After Duque's uncle withdrew in 2003, the court appointed Daniel Stubbs to serve as conservator; Stubbs was replaced by Jeffrey Siegel, the current conservator and respondent, in April 2014.

Beginning in 2005 and for some period of time thereafter, the court appointed a probate volunteer panel (PVP) attorney to represent Duque.[2] At various times, Duque also privately retained several attorneys, including Johnson, to assist him in seeking court permission to remove the conservator and allow Duque to handle his own financial affairs. Duque privately retained Johnson in 2007, and although it is not entirely clear from the appellate record whether Johnson's representation was continuous, he is referenced in court documents through at least 2014.

In August 2008, Johnson petitioned the court for attorney fees of approximately $32,112.50 for services rendered from June 2007 through August 11, 2008. The court ordered the conservator to pay Johnson fees of $19,000 for that period.

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[1] The respondent is Jeffrey Siegel, the conservator of Duque's estate.

[2] The probate volunteer panel consists of attorneys who are appointed by the probate court to represent persons in, among other things, conservatorship and guardianship proceedings. (<http://www.lacourt.org/division/probate/PR0076.aspx> (as of June 15, 2016.))

II.

The December 2009 Hearing and March 2010 Order

A. December 2009 Hearing

On December 18, 2009, the court held a hearing (the December 2009 hearing) in regard to Duque's complaint that the conservator was not returning his phone calls. Duque appeared without counsel. During the hearing, the court inquired whether a PVP attorney should be appointed to represent Duque, and the conservator's attorney, Sajan Kashyap, suggested that Duque's former PVP attorney, Darrell Brooke, be reappointed. The court agreed to reappoint Brooke and set the matter for a status conference in March 2010.

As relevant to the present appeal, Duque, his wife, and Kashyap then had the following exchange with the court:[3]

"Mr. Duque: I have request. I have another lawyer. Maybe he can help me come inside in front of you.

"The Court: That's what Mr. Brooke will do.

"Mr. Duque: No, I have my own. I want to select –

"Mrs. Duque: Your Honor, he wants to request a continuance of 60 days and he wants to get his own lawyer.

"Mr. Duque: My own.

"The Court: Let me explain something to you. Right now you are under a conservatorship and at this point the court is appointing Mr. Brooke to represent you . . . . It's his obligation to represent you and your interest so that he's not representing [the conservator]. He's not – all he's doing is looking out for your interest. [¶] You're under a conservatorship for a reason and so the court is making sure that there isn't anyone else who's going to take advantage of you. We need to make sure that it's somebody who knows about the case and knows about the laws in this area. Not all lawyers do and so

[3] Duque's native language is Tagalog; English is his second language.

that's why the court is making this order. . . . [¶] . . . [¶] We're going to make sure Mr. Brooke represents you. So that – we're looking out for your interests, okay.

"Mr. Duque: Yeah. So I don't need – I just want to select what I want as a lawyer, a probate attorney.

"Mrs. Duque: No, you can't.

"The Court: Well, if you want to go hire someone else –

"Mr. Duque: Yes.

"The Court: – that's fine. I don't know what you're going to pay them with. If you've got – you know, maybe your wife has some money and she wants to pay.

"Mr. Duque: Of course I have money to pay.

"Mr. Kashyap: No.

"Mrs. Duque: No, no.

"The Court: But the court right now controls your finances, okay.

"Mr. Duque: Supposed to be – if they are handle my case, how about my money?

"The Court: Right. The court is overseeing that.

"Mr. Duque: It's a big problem. They don't give me –

"The Court: We'll see you back here March 19th. Thank you very much.

"Mr. Duque: Okay, I find a lawyer."

B. March 2010 Order

In March 2010, conservator Stubbs submitted a proposed order, which the court signed on March 12, 2010 (the March 2010 order). The order referenced the December 2009 hearing and stated that "[u]pon examining the entire record and considering all evidence and arguments presented at the time of the hearing, the Court made the following findings:

"1. Due notice has been given as required by law. [¶] . . . [¶]

"5. Darrell G. Brooke, Esq. has agreed to serve as Conservatee William Javier Duque's PVP.

"6. Conservatee William Javier Duque remains vulnerable to predators.

"7. The Conservatorship of the Estate of William Javier Duque should continue with Daniel G. Stubbs as the Conservator of the Estate.

"8. In the best interests of the Conservatee, the only attorney representing William Javier Duque to be paid for his professional services from conservatorship resources shall be PVP.

"9. Conservatee William Javier Duque represented himself after discharging his latest private attorney, Julius Johnson, Esq. Conservatee has repeatedly expressed dissatisfaction with a succession of private attorneys whom he retained on the advice of family and friends without prior consultation with this Conservator or PVP or the Court. Conservator has repeatedly complained to his Conservator, to PVP, and to the Court about high legal fees charged by such private attorneys. In the best interests of Williams Javier Duque, payment for services of any private attorneys of Conservatee William Javier Duque shall no longer be a Conservatorship obligation."

III.

Johnson's Requests for Attorney Fees

A. October 2013 Motion for Fees

Johnson filed a motion for attorney fees on October 4, 2013. He asserted that he had represented Duque since June 2007 and had submitted a prior request for fees incurred from June 5, 2007 until August 11, 2008. The present request was for fees incurred from August 12, 2008 through July 23, 2013. In support, Johnson attached a copy of his retainer agreement and itemized billing records.

At a December 3, 2013 hearing, the court advised Johnson that the fee request did not comply with court rules, had not been properly noticed, and should be refiled as a petition. The court denied the fee motion without prejudice.

B. January 2014 Petition for Fees

Johnson filed a renewed request for attorney fees on January 14, 2014. The renewed request largely tracked the prior request, but also attached Johnson's declaration describing the kinds of services he had rendered on Duque's behalf.

The PVP attorney filed a report on February 5, 2014, in which he opposed Johnson's request for fees. Among other things, the PVP attorney stated that he "is . . . informed and believes . . . that there is a Court order made in these proceedings . . . that prohibits the payment of privately retained attorney's fees."

On April 4, 2014, the court took judicial notice of the March 2010 order. Johnson urged that the order should not be dispositive of his right to recover fees from the conservatorship estate because he had not received notice of either the December 2009 hearing or the March 2010 order. The court disagreed: "[H]ere's the problem I have. I've got an order which has not been set aside. There's no subsequent order for reconsideration, and there is a time constraint for reconsideration. If the argument is, you didn't receive effective notice, the code and the provision requires some action to be taken as soon as you learn about this order, and then the question is, do you have a laches argument or not. [¶] None of that's briefed in here. . . . [¶] . . . [¶] . . . So I'm really trying to understand – are you making a [Code of Civil Procedure section] 473 argument? [¶] Are you making a . . . [Code of Civil Procedure section] 473 argument or a [Code of Civil Procedure section] 1008 argument?"

Johnson said the March 2010 order should not be given effect because it was based on a fraud on the court. The court noted that Johnson had not made a request to set aside the March 2010 order on the basis of fraud, and "without more, I'm still stuck with an order that is a binding order until set aside. That's the problem that I see you have. . . . [¶] . . . [¶] . . . What you're asking me to do is to disregard [a prior court] order, and you need some legal basis for me to do that. That's the problem that you have." The court denied the fee request without prejudice.

C. August 2014 Motion to Correct Erroneous Order

On August 11, 2014, Johnson filed a "motion to correct erroneous order; renewed petition for attorney fees for Julius Johnson, attorney for William J. Duque." He urged that the March 2010 order should be set aside because (1) it included orders and findings not made by the court at the December 2009 hearing, (2) Johnson had not been served with notice of the hearing or order, and (3) the court had inherent power to modify the

order "to ensure that it accurately reflects the findings and orders." Johnson requested fees of $41,380.

The conservator opposed the motion, urging that Johnson had not cited any applicable legal authority and that neither sections 1008 or 473 of the Code of Civil Procedure authorized the "corrections" Johnson sought.

On September 17, 2014, the court denied Johnson's motion. The court found that Johnson had not provided any evidence of extrinsic fraud, and therefore the court lacked authority to vacate the March 2010 order. It explained: "[Code of Civil Procedure section] 1008(a) does not apply. [¶] [Code of Civil Procedure section] 473(d) does not apply either. It's untimely. [¶] And in reviewing the file, the court finds no evidence of extrinsic fraud, which would warrant changing . . . the order."

Johnson timely appealed from the order denying his request for attorney fees.

DISCUSSION

I.

Appealability and Standard of Review

"An appeal may be taken from 'an order made appealable by the . . . Probate Code.' (Code Civ. Proc., § 904.1, subd. (a)(10).) Under the Probate Code, an appeal lies from an order refusing to authorize or allow 'payment of compensation or expenses of an attorney.' (§ 1300, subd. (e); see also *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1450, fn. 5 . . .].)" (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1594-1595.)[4]

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[4] Respondent urges that Johnson lacks standing to appeal because he "is not representing Mr. Duque[,] . . . Mr. Duque has not consented to this appeal . . . [and] Mr. Duque does not even have the capacity or ability to bring this Appeal because Mr. Duque is under conservatorship." We do not agree that Johnson lacks standing. "Any party aggrieved by a judgment may appeal the judgment. (Code Civ. Proc., § 902.) 'An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision.' (*In re K.C.* (2011) 52 Cal.4th 231, 236.)" (*County of Riverside v. Public Employment Relations Board* (2016) 246 Cal.App.4th 20, 28.) Johnson thus has standing to pursue this appeal on his own behalf because his interest—specifically his interest in being compensated for his legal work rendered on Duque's behalf—unquestionably was "injuriously affected" by the trial court's decision denying

We review the probate court's order denying Johnson's request for an abuse of discretion. (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234; *Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1534.) " ' "The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [¶] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision." [Fn. omitted.]' (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *In re Marriage of Martin* (1991) 229 Cal.App.3d 1196, 1200.) 'The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason.' (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

" A '. . . showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . . (*Brown v. Newby* (1940) 39 Cal.App.2d 615, 618.) ' "A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citations.]' (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)" (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.)

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his fee request. (See *Ruiz v. California State Automobile Assn. Inter-Insurance Bureau* (2013) 222 Cal.App.4th 596, 610 [holding that counsel had standing, in their own right, to litigate the amount of attorney fees, both in the trial court and on appeal.].)

II.

The Probate Court Did Not Abuse Its Discretion by Finding No Extrinsic Fraud

Johnson urges that even after relief is no longer available under Code of Civil Procedure section 473, subdivision (b)[5], an order or judgment may be set aside if was obtained through extrinsic fraud, including "fail[ing] to give notice of the action to the other party." Johnson suggests that extrinsic fraud was present in this case because although he was Duque's attorney of record in December 2009 and March 2010, he was not given notice of the December 2009 hearing, was not present at the hearing, and was not served with a copy of the March 2010 order. On this record, Johnson urges, "extrinsic fraud is established" and the underlying order must be reversed.

" 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic [citations]. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court [citations]. If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citation], there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. [Citations.] Fraud perpetrated under such circumstances is intrinsic, . . .' [citations]." (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1061.)

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5 Code of Civil Procedure section 473, subdivision (b) provides that the court may "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." An application for such relief shall be made within "a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Assuming without deciding that a failure to serve Johnson with notice of the hearing and order constitutes extrinsic fraud that would justify setting aside the March 2010 order, we nonetheless conclude that Johnson has failed to show reversible error. Johnson's claim of extrinsic fraud is based on the premise that although he was Duque's counsel of record throughout the relevant period, he was not served with notice of the December 2009 hearing or the March 2010 order. This premise is not established by any *evidence* in the record, however. Specifically, the record does not include the proofs of service of the notice of hearing, proposed order, or signed order, nor does it include a declaration by Johnson or any other statement made under penalty of perjury that Johnson did not receive notice of the hearing or order. Johnson's *only* record citations in support of his contention that he was not served with proper notice are to his written request for fees and to his oral statements to the court—neither of which were sworn or made under penalty of perjury.[6] These citations, therefore, are not evidence that could support a finding of extrinsic fraud. (E.g., *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 ["It is axiomatic that the unsworn statements of counsel are not evidence"]; *In re Anthony T.* (2012) 208 Cal.App.4th 1019, 1032, fn. 7 ["Unsworn statements of counsel are not evidence"]; *In re Heather H.* (1988) 200 Cal.App.3d 91, 95 ["unsworn testimony does not constitute 'evidence' within the meaning of the Evidence Code"].) Accordingly, the probate court did not err in finding that Johnson did not meet his burden to establish extrinsic fraud.

III.

The Probate Court Did Not Misunderstand the Limits of Its Jurisdiction

Johnson also urges that the order denying his request for attorney fees should be set aside because the probate court believed, erroneously, that it lacked jurisdiction to reconsider and correct its prior order. In support, Johnson notes the following colloquy:

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[6] Johnson stated at oral argument that he was sworn by the court clerk prior to the hearing, but such is not reflected in the reporter's transcript on appeal.

"The Court: You're asking me to correct something from how long ago?

"Mr. Johnson: 2009, Your Honor.

"The Court: I don't have jurisdiction."

Based on the court's statement, Johnson asserts that "the court failed to recognize its jurisdictional power to correct the order."

We do not agree that the probate court misunderstood its power to correct prior orders. To the contrary, in the pages of the transcript following the colloquy on which Johnson relies, the court acknowledged its authority to set aside an order based on extrinsic fraud, and specifically found that "in reviewing the file, *the court finds no evidence of extrinsic fraud which would warrant changing the order*." (Italics added.) Given this record, we conclude that the probate court was well aware of its authority to set aside the March 2010 order on a proper showing of extrinsic fraud.

IV.

The Probate Court Did Not Abuse Its Discretion by Declining to Order Fees Incurred Prior to March 2010

Johnson contends finally that even if the probate court could not award fees incurred *after* March 10, 2010, it should have awarded fees of approximately $7,000 incurred prior to that time. This issue is raised for the first time on appeal; therefore, we do not consider it. (E.g., *Jewish Community Centers Development Corp. v. County of Los Angeles* (2016) 243 Cal.App.4th 700, 715 [argument raised for the first time on appeal is forfeited]; *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 92 [same].)

DISPOSITION

The order of September 17, 2014 denying the "motion to correct erroneous order; renewed petition for attorney fees" is affirmed. Respondent is awarded appellate costs, to be paid by appellant Julius Johnson.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.